

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

SEIU LOCAL 790,

Charging Party,

v.

COUNTY OF SAN JOAQUIN,

Respondent.

Case No. SA-CE-41-M

PERB Decision No. 1600-M

February 24, 2004

Appearance: Van Bourg, Weinberg, Roger & Rosenfeld by Matthew J. Gauger, Attorney, for SEIU Local 790.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by SEIU Local 790 (SEIU) of a Board agent's dismissal of an unfair practice charge (attached). The charge alleged that the County of San Joaquin (County) violated the Meyers-Milias-Brown Act (MMBA)¹ by refusing to adopt a mediator's recommended decision without explanation. SEIU alleged that this conduct constituted a violation of MMBA sections 3503, 3505 and 3507.

Upon review of the record, including the unfair practice charge, the amended charge, the second amended charge, the responses from the County, the warning and dismissal letters, and SEIU's appeal, the Board adopts the Board agent's dismissal as the decision of the Board itself.

¹MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

BACKGROUND

The charge, filed on March 15, 2002, is summarized as follows: The parties participated in mediation over the issue of 12 hours holiday credit for a 12-hour shift worked on a holiday. The parties were negotiating a side letter agreement. SEIU proposed the 12-hour credit for respiratory therapy staff and asked the County whether nurses were receiving 12 hours of holiday credit. SEIU alleges that the County misled it by not providing SEIU with information that the County, as a matter of practice, provided the nurses with 12 hours of holiday credit. As a result, after the parties reached impasse, SEIU dropped its proposal. The County claimed that the director of employee relations shared a May 12, 1999 memo with SEIU Representative Steve Wilensky, an allegation which Wilensky denies. The information was not shared with other members of the management team. SEIU however did not allege unfair bargaining by the County.

The mediator found that the County committed an unfair practice by failing to provide SEIU negotiators with accurate information. She recommended that the County provide the respiratory therapy staff with 12 hours of holiday compensation for all 12-hour shifts worked on holidays, compensation to be in effect from the date of the side letter agreement to the date a new agreement is negotiated. The mediator also recommended that if the nurses continue to receive this benefit after negotiations with the County, the County should reopen negotiations with SEIU on this issue if requested.

In the first amended charge, filed March 25, 2002, the cover letter mentions a “change in conditions” amendment. This is explained in the actual charge, with the word “retaliation” thrown in, as violations that the mediator found without further discussion. However, the mediator’s decision said nothing about a change in conditions or retaliation.

The Board agent found that SEIU failed to state a prima facie case. He found no precedent for the Board to enforce the non-binding mediator's recommendation. The Board agent noted SEIU's theory that the County's failure to provide a rationale for its decision was unlawful; but, that SEIU never addressed how this theory violated the MMBA. The County's Employer-Employee Relations Policy (EERP) gives the County discretion to adopt a hearing officer's proposed decision.² The Board agent also refutes SEIU's argument that despite this language, the ordinance would be meaningless if the County's board does not adopt the mediator's recommendation. Even assuming that SEIU was correct, the Board agent found that SEIU has not shown that the County's board has rejected the proposed decision. Therefore, he dismissed the charge.

DISCUSSION

MMBA section 3507 provides, in pertinent part:

(a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter.

PERB Regulation 32603(f),³ which implements Section 3507, provides that it shall be an unfair practice for a public agency to:

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

² Under Section 13, paragraph 2 of the County's EERP, the hearing officer "shall hear the charge and issue a decision and report indicating his/her rationale and such decision and report may be adopted by the Board of Supervisors." (Emphasis added.)

³ PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq. A revision of PERB Regulation 32603(f) became effective February 2, 2004, subsequent to the filing of this unfair practice charge. The revision has no bearing on the Board's consideration of this matter.

SEIU alleges that the County board has unlawfully refused to adopt the mediator's findings. SEIU reasons that the County did not provide any rationale for its conduct. The parties have been negotiating the issue of 12-hour holiday credits since the mediator issued her recommended decision but have failed to achieve any resolution.

SEIU cites Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 515 [113 Cal. Rptr. 836] (Topanga) as support for its argument that the County must provide a rationale for its refusal to adopt the mediator's findings. In Topanga, the court examined a challenge to a county board's grant of a zoning variance in application of Government Code 65906 and a harmonious local ordinance covering zoning variances. The court found that Code of Civil Procedure section 1094.5, the State's administrative mandamus provision, applies to such proceedings and provides that, as a minimum, the reviewing court must determine whether substantial evidence supports the agency's findings and whether the agency's findings support its decision. Implicit in section 1094.5 is a requirement that "the agency must make findings that bridge the analytic gap between the raw evidence and the ultimate decision or order." (Topanga, at p. 515.)

Topanga is inapplicable to the case before us for at least two reasons. First, unlike Topanga, which involves the local agency's review of a variance permit under standards set in statute, here, SEIU is alleging that the County is violating a local rule, which, under MMBA, the County had to adopt after good faith consultation with SEIU or its predecessor union. Thus SEIU or its predecessor union presumably had input into the adoption of the local rule. There was no evidence provided in the charge that the parties' intended any meaning for EERP section 13(2) other than the plain meaning of the language of that provision. Second, EERP section 13(2) states that the hearing officer's decision "may be adopted by the Board of Supervisors." Unlike Topanga, where the variance hearing occurred and was under review by

the court, there is no evidence that the mediator's decision was ever brought before the County's board or that the County board had the opportunity to refuse to adopt the mediator's findings. In fact, SEIU states that it has been continuing to negotiate the issue since the mediator issued her decision. Therefore, if the parties are continuing to negotiate, and the matter has not been brought before the County's board for adoption of the mediator's decision, then no facts exist to support SEIU's allegation that the County unreasonably refused to adopt the mediator's decision in violation of MMBA section 3507 and PERB Regulation 32603. We therefore agree with the Board agent that SEIU has failed to state a prima facie violation of the MMBA. As we find at the outset that the facts in Topanga do not apply to this matter, it is unnecessary to address the Topanga standard proffered by SEIU or the issues resulting from application of that standard.

On appeal, SEIU asserts that the face of the charge states a prima facie case, in that it incorporates by reference findings in the mediator's report, that the employer failed to provide necessary and relevant information concerning holiday pay. This allegation is somewhat ambiguous. If this refers to the allegations of "changed conditions" and "retaliation," the Board dismisses these allegations as not meeting the requirements of PERB Regulation 32615(a)(5), which requires the charge to contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Otherwise, SEIU appears to raise a new allegation on appeal, that the County refused to provide information during negotiations. Under PERB Regulation 32635(b), a party "may not present on appeal new charge allegations or new supporting evidence" unless good cause is shown. SEIU did not provide any facts to support good cause. The Board therefore dismisses this allegation.

In its appeal, SEIU also argues that State policy favors mediation and in ignoring the mediator's recommendation, the County violated the policy. SEIU cited several appellate

court cases in support of its contention. However, those cases involve the State's policy to support agreements providing for binding arbitration, not mediation, which is non-binding. The Board therefore finds this argument not persuasive in sustaining a violation of MMBA.

ORDER

The unfair practice charge in Case No. SA-CE-41-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.

Dismissal Letter

March 7, 2003

Matthew Gauger, Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
1006 4th Street, Suite 1050
Sacramento, CA 95814

Re: SEIU Local 790 v. County of San Joaquin
Unfair Practice Charge No. SA-CE-41-M 1st Amended Charge
DISMISSAL LETTER

Dear Mr. Gauger:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 15, 2002. The SEIU Local 790 alleges that the County of San Joaquin violated the Meyers-Milias-Brown Act (MMBA)¹ at sections 3503; 3505 and 3507 by failing and refusing to implement the findings of a hearing officer in an unfair practice charge heard under the auspices of the local ordinance.²

I indicated to you in my attached letter dated February 4, 2003, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to February 14, 2003, the charge would be dismissed.

On February 14, 2003, you submitted a letter in which you address the theory of the alleged violation. Attached along with this letter is a copy of a March 21, 2002 letter, which was not served on the Respondent, and the First Amended Charge as filed on March 25, 2002.

To summarize your theory of the case, the local ordinance has no meaning if the County can decide whether or not to implement the findings of an appointed neutral hearing officer. You assert that the County has issued an invalid order if it does explain its rationale for ignoring the proposed order.³ You cite *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 as the precedent that requires an administrative agency to "bridge the analytic gap between the raw evidence and ultimate decision or order." You assert that by the County's failure to explain why the Board of Supervisors has refused to implement

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² The charge was amended on March 25, 2002, to include these allegations. The earlier charge simply stated that the Employer refused to accept the hearing officer's decision.

³ The County has responded to the charge by indicating its continuing willingness to work towards resolution of the underlying matter, holiday pay for respiratory staff.

the hearing officer's findings, or alternatively, explain its reasons for refusing to do so, it has not bridged the analytic gap.

You have not addressed either in your letters or charge, how the County's failure to explain its rationale to this point, violates the MMBA. Section 13 (2) of the employer's local ordinance provides:

The Hearing Officer shall hear the charge and issue a decision and report indicating his/her rationale and such decision and report may be adopted by the Board of Supervisors.

Thus, the language of the ordinance provides for acceptance of proposed hearing officer decisions at the County's discretion. You argue that despite this language, the ordinance would be meaningless if the Board of Supervisors could refuse to adopt a hearing officer's decision. Even assuming arguendo, that you are correct, you have not established that the Board of Supervisors has taken any action to reject the proposed decision. It is unclear based on these facts, what the underlying violation of the MMBA is. Therefore, I am dismissing the charge based on the facts and reasons contained in this and my February 4, 2003 letter.

Right to Appeal

Pursuant to PERB Regulations,⁴ you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board

⁴ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Roger Smith
Labor Relations Specialist

Attachment

cc: David Wooten

Warning Letter

February 4, 2003

Matthew Gauger, Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
1006 4th Street, Suite 1050
Sacramento, CA 95814

Re: SEIU Local 790 v. County of San Joaquin
Unfair Practice Charge No. SA-CE-41-M
WARNING LETTER, 1st Amended Charge

Dear Mr. Gauger:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 15, 2002. The SEIU Local 790 alleges that the County of San Joaquin violated the Meyers-Milias-Brown Act (MMBA)¹ at sections 3503; 3505 and 3507 by failing and refusing to implement the findings of a hearing officer in an unfair practice charge heard under the auspices of the local ordinance.²

At issue is a dispute over whether the County has failed to implement the findings and recommendation issued by Hearing Officer Shirley Campbell on February 13, 2002 pursuant to Section 13 (2) of the local Labor Relations Ordinance. That section provides in relevant part:

Following an initial meeting of the parties to determine if the charge can be resolved mutually, and failing to do so, the parties shall appoint a hearing officer in the same manner as is provided in section 12.F(3) of this Policy. The Hearing Officer shall hear the charge and issue a decision and report indicating his/her rationale and such decision and report may be adopted by the Board of Supervisors.

Shirley Campbell issued a ruling on February 13, 2002 that found that:

(t)he County committed an Unfair Labor Practice during negotiations in 1999 when it failed to provide Union negotiators, with accurate information. Therefore, it is recommended that affected respiratory staff be credited with twelve hours of holiday

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² The charge was amended on March 25, to include these allegations. The earlier charge simply stated that the Employer refused to accept the hearing officer's decision.

compensation for all twelve-hour shifts worked on holidays from the date the side letter was signed in May 1999 to the date a new MOU became effective in April or May 2001. The twelve-hour holiday credit should cease on the first day of the MOU which became effective in April or May 2001.

Throughout the remainder of 2002, the parties attempted to reach agreement on the terms of the remedy. My last inquiry as to the status of the case has gone unanswered.

The theory behind your charge is that the County issued an invalid order and that PERB should intervene and correct the situation. You appear to be requesting that this agency enforce a non-binding hearing officer recommendation against the employer. I am aware of no statutory or case law authority to support such a request.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Second Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before February 14, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Roger Smith
Labor Relations Specialist